United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

COURT

76-7125

To Be Argued By
WILLIAM J. MULLER

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

B
P/S

Docket No. 76-7125

GERALD LIPSKY, executor under the Will of WALDEN ROBERT CASSOTTO (a/k/a BOBBY DARIN) deceased,

Plaintiff-Appellant,

-against-

COMMONWEALTH UNITED CORPORATION (now known as IOTA INDUSTRIES, INC.); COMMONWEALTH UNITED MUSIC, INC.; THE HUDSON BAY MUSIC COMPANY (formerly known as ALLEY-STREET MUSIC VENTURE); ALLEY MUSIC CORPORATION; and STREET SONGS, INC.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFF-APPELLANT

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PRELIMINARY STATEMENT

This is an appeal from a final order and judgment dismissing an amended complaint and from a prior order to strike, both entered by the United States District Court

for the Southern District of New York, Hon. Frank H. McFadden, sitting by assignment. The orders and judgment have not been officially reported.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. When a party to a contract, obligating a publicly held corporation to issue to him unregistered shares of its stock and thereafter to use its best efforts to effect their registration with the Securities and Exchange Commission ("SEC") at the earliest practicable time, seeks rescission of the contract and restoration of its parties to their status at its inception because of the corporation's breach of its best efforts obligation, is it error for the District Court to dismiss the complaint on the ground that that obligation was a mere incident of the contract and not of its essence, when the complaint alleges otherwise?

2. Under the facts alleged in the Second Amended Unified Complaint, is restoration to plaintiff's decedent of control over the unique properties which he turned over to the corporation pursuant to the contract not an available remedy because of the circumstance that (a) the corporation had sold such properties to third parties who had knowledge of the demand for rescission in this action and held indemnification against loss as a result thereof, or (b) that the

market value of the stock exchanged for such properties pursuant to the contract thereafter declined or (c) that at the time of the exchange title to such properties was held in the name of plaintiff's wholly-owned corporation?

3. In view of the allegations of the Second Amended Unified Complaint, particularly those showing that there had been a total failure of the consideration promised plaintiff's decedent under the contract in that the corporation's breach of its covenant to use best efforts to effect registration of its stock with the SEC without expense to plaintiff's decedent deprived him of a valuable, contractual benefit, could that pleading be properly dismissed pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to allege injury as a result of such breach?

4. Was it reversible error for the court below to strike from the Second Amended Unified Complaint as "impertinent and immaterial" within the meaning of Rule 12(f) of the Federal Rules of Civil Procedure, allegations as to (i) deficiencies in the defaulting party's efforts to effect registration of the shares of its stock issued to plaintiff's decedent pursuant to the contract and (ii) the position of the SEC regarding identical and similar deficiencies in contemporary filings with the SEC by the defaulting party?

5. Was it reversible error for the court below to order the filing of a further complaint identical to the Amended Unified Complaint except for the deletion of the foregoing allegations and an exhibit, thereby not only preventing the plaintiff from pleading any reference to the position of the SEC in litigation as to deficiencies in 1969 proxy and registration filings with the SEC relating to the defaulting party and its securities but also precluding plaintiff from repleading, without reference to the SEC's position, the allegations of its prior pleading as to deficiencies in the defaulting party's proxy statement and registration filings with the SEC covering his decedent's unregistered shares?

STATEMENT OF THE CASE

Nature of the Case.

This is an appeal from:

(i) a final order and judgment, entered February 17, 1976, dismissing with prejudice an amended complaint seeking equitable relief, i.e. rescission of a contract for the transfer of stock and restoration of the parties to their status quo ante because of the breach by one of the contracting defendants of its obligation under the contract to use its best efforts to effect registration of the transferred stock at the earliest practicable time, and

(ii) an order, entered July 15, 1975, striking as "immaterial and impertinent" allegations and an annexed exhibit from the preceding pleading (the Amended Unified

Complaint) and directing that a further complaint be filed, identical to that prior pleading except for the deletion of those allegations and that exhibit.

Following a formal demand for rescission in April 1970, (App. 167, ¶ 15)* this action was commenced by plaintiff's decedent Walden Robert Cassotto, a/k/a Bobby Darin ("Darin") in the United States District Court for the Central District of California seeking, inter alia, (i) rescission of the agreement of August 20, 1968 and restoration to Darin of the consideration transferred by him to Commonwealth United Music, Inc. ("CUM"), a wholly-owned subsidiary of Commonwealth United Corporation ("CUC"), (ii) compensatory damages of $7,000,000 and (iii) punitive damages of $2,000,000. (App. 5,21) The original complaint asserted against fifteen defendants causes of action for rescission, breach of contract, fraud and violation of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78j(b) and 78n(a) and the Securities Act of 1933, 15 U.S.C. § 77a(a)). (App. 5,6)

Pursuant to an order of the Judicial Panel on Multidistrict Litigation dated October 28, 1970 (App. 63), this action was transferred to the United States District Court for the Southern District of New York as a tag-along case to sixteen class and derivative suits then pending here against CUC and/or Seeburg Corporation, a company acquired by CUC after

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* ¶ refers to paragraph of the Second Amended Unified Complaint, which is set forth at pages 161-171 of the Joint Appendix (App. ____).

the transaction in issue in this action. (Docket No. M-19-95, Commonwealth Cases.) All of those sixteen suits were consolidated into two class actions, Land and Fried, and were substantially settled before trial and well before completion of discovery therein.

In August 1972 plaintiff's counsel were substituted as Darin's attorneys, and, in the following November, this action was transferred to the Southern District of New York for all purposes, upon the District Court's approval of a stipulation by those who had appeared herein. (App. 64). Darin's action was not brought as a class or derivative action and Darin was never within any class certified in the course of the Seeburg-Commonwealth Multidistrict Litigation.

On November 21, 1972 Darin moved for leave to file amended and supplemental pleadings (containing allegations with respect to an action commenced by the SEC against CUC on October 2, 1969 (the "SEC action") involving CUC proxy and securities registration statements filed during the pendency of its filings covering Darin's CUC shares) and to add additional defendants, including The Hudson Bay Music Company, Alley Music Corporation and Street Songs, Inc. (the "Hudson Bay defendants"). Late in 1970, with full knowledge of Darin's claims in this action, the Hudson Bay defendants acquired from CUC and CUM a substantial portion of the assets of TM. The transaction provided for

the indemnification of the Hudson Bay defendants against loss as a result of Darin's claims to those assets. (App. 168, 169, ¶¶ 17, 18). CUC and CUM opposed Darin's motions and in January 1973 moved to dismiss the complaint, in whole or in part.

In November 1973, some ten months after the designated return dates of Darin's motions, the District Court granted Darin's request to amend, to supplement and to add parties and denied the motion to dismiss.* Darin thereafter moved to file a Unified Complaint, which was permitted by the District Court pursuant to a stipulation dated December 13, 1973 establishing, inter alia, a timetable for the defendants' pleadings. Darin died December 20, 1973, and on July 26, 1974, following conferences with the District Court in June, Gerald Lipsky, Darin's executor, was substituted as plaintiff herein. An Amended Unified Complaint reflecting the foregoing substitution was served and filed August 5, 1974. (App. 71).

By notices dated August 28, 1974 CUC, CUM and the Hudson Bay defendants moved the District Court for an order under Rule 12(f) of the Federal Rules of Civil Procedure striking some four allegations (alleging (i) deficiencies in CUC's

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* In May 1973, mindful of a possible statute of limitations defense by the Hudson Bay defendants, Darin commenced a second action in the Southern District (73 Civ. 2381) against CUC, CUM, the Hudson Bay defendants and others, for rescission of the contract of August 20, 1968 and related equitable relief. CUC and CUM moved to dismiss this action and their motion was granted by the District Court's order of November 9, 1973.

efforts to effect registration of the shares of its stock issued to Darin pursuant to the contract and (ii) the position of the SEC regarding identical and similar deficiencies in contemporary filings with the SEC by CUC) and Exhibit C (a photocopy of the complaint in the SEC action) from the Amended Unified Complaint on the ground that they were "impertinent and immaterial." (App. 99-113). Following oral argument on March 31, 1975, the District Court, without opinion, granted the defendants' motions by order dated July 11, 1975 directing that a further complaint identical to the Amended Unified Complaint after deletion of the foregoing allegations and exhibit be served and filed. (App. 155-160). By operation of this order the plaintiff was prevented not only from pleading any reference to the position of the SEC in litigation as to deficiencies in 1969 proxy and registration filings with the SEC relating to CUC and its securities, but he was also precluded from repleading, without reference to the SEC's position, the allegations of his prior pleading as to deficiencies in CUC's proxy statement and registration filings with the SEC covering Darin's shares. (App. 166, 167, ¶¶ 10, 11, 13, 14). The latter result had not been sought by the defendants' motions. (App. 99-113). This order is now appealed from, as well as the

final order and judgment below.

On July 29, 1975 the plaintiff served and subsequently filed his Second Amended Unified Complaint Filed Pursuant to Pretrial Conference Order Dated July 11, 1975 (the "Second Amended Unified Complaint"), omitting, as directed, reference to the deficiencies of various CUC filings covering Darin's shares, as well as any reference to the SEC action. (App. 161, 166, 167, ¶¶ 10, 11, 13, 14). By notices dated August 26, 1975 the defendants moved to dismiss the Second Amended Unified Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure on the ground that it failed to state a claim upon which relief could be granted -- in part relying on the absence of the previously cited deficiencies in CUC's filings which the plaintiff had been foreclosed from pleading. (App. 172-174). After oral argument at a pretrial conference on October 15, 1975, the District Court announced that the defendants' motions would be granted. On February 17, 1976 a Final Order and Judgment was entered dismissing the Second Amended Unified Complaint with prejudice and directing that 10,000 shares of common stock of CUC reserved for Darin by a Stipulation of Settlement entered in the Seeburg-Commonwealth Multidistrict Litigation be endorsed to "Gerald Lipsky as executor under the will of Walden Robert Cassotto" and delivered to plaintiff's counsel. (App. 196-200). The

dismissal was without opinion but contained the following conclusions of the District Court:

> 1. The Agreement dated August 20, 1968, annexed to the Second Amended Unified Complaint provided for an exchange of stock between Darin and Commonwealth United Music. Specifically Darin was to deliver to Commonwealth United Music all the outstanding stock of a corporation he controlled, T.M. Music, Inc., in exchange for certain unregistered, legended shares of stock of Commonwealth United Music's parent, defendant [CUC]. In the Agreement, [CUC] promised to file and thereafter to use its best efforts to cause to become effective at the earliest practicable time a registration statement under the Securities Act of 1933, covering said shares. It is undisputed that the exchange of shares and the filing of a registration statement occurred within the times called for by the Agreement. Plaintiff's essential charge herein is that [CUC] failed thereafter to use its best efforts to cause such registration statement to become effective at the earliest practicable time, and for the purposes of defendants' motion to dismiss, that charge is deemed admitted;
>
> 2. The equitable relief demanded by plaintiff in the Second Amended Unified Complaint may not be granted in that the Agreement dated August 20, 1968, as annexed thereto, shows that the promise allegedly breached by [CUC], to wit, to use its best efforts to cause the registration statement covering plaintiff's decedent's shares of stock of [CUC] to become effective at the earliest practicable time, was only incidental to the exchange of stock under said Agreement and was not the essence of said Agreement and, accordingly, rescission is not an available remedy for the alleged breach of such promise;
>
> 3. The equitable relief demanded by plaintiff may not be granted in that the Second Amended Unified Complaint shows no breach by defendant Commonwealth United Music, Inc. ("CUM") of said Agreement dated August 20, 1968 and accordingly, as CUM received the stock of T. M. Music, Inc. under said Agreement, it cannot be required to disgorge such stock because of the alleged breach of the collateral promise by [CUC];

4. The equitable relief demanded by plaintiff cannot be granted in that said Second Amended Unified Complaint seeks a return of assets owned by T. M. Music, Inc. at the time of said exchange of stock, and no facts are alleged therein showing any entitlement of plaintiff to such corporate assets even if rescission of the Agreement were ordered;

5. The equitable relief demanded by plaintiff cannot be granted in that the Second Amended Unified Complaint reveals that events since said exchange of stock under said Agreement have radically changed the relative values and status of the shares exchanged thereunder and of the assets once held by T. M. Music, Inc. and, accordingly, it is not possible to restore the parties to the status quo;

6. The Second Amended Unified Complaint is fatally deficient in that it lacks allegations to show that [CUC's] alleged failure to use best efforts was the cause of any injury to plaintiff's decedent;

7. Even if plaintiff were entitled to equitable relief as demanded in the Second Amended Unified Complaint against defendants [CUC] and CUM, said complaint is fatally deficient as to all other defendants in that it fails to show any facts entitling plaintiff to the equitable relief demanded against said other defendants. (App. 198-200).

Discovery in this action is incomplete. Darin was examined by counsel for CUC and CUM, but the plaintiff has not deposed any of the defendants. The plaintiff has had access to a document repository established by order in the Seeburg-Commonwealth Multidistrict Litigation and to the files of CUC's former corporate counsel relating to CUC's filings with the SEC alleged to demonstrate its efforts to effect registration of Darin's CUC securities between August 1, 1968 and January 1, 1970. The plaintiff's first set of interrogatories (App. 65-70), served November 30, 1973, was

answered by CUC and CUM on or about September 6, 1974. (App. 114-154). All further discovery, including the plaintiff's interrogatories to the defendants dated March 24, 1975 and the plaintiff's 134 Requests for Admission, was stayed by the District Court's Pretrial Conference Order of July 11, 1975. (App. 159-160).

Statement of Facts.

This is an appeal from two orders entered upon motion under Rules 12(b)(6) and 12(f) of the Federal Rules of Civil Procedure. (App. 155, 196). As such, the facts subject to scrutiny at this stage are the allegations of the plaintiff's pleadings, principally the Second Amended Unified Complaint, to which reference is made throughout this brief. In the interests of brevity the facts are summarized here.

In August 1968 Darin was well known as an actor and singer and composer of popular songs. (App. 162, ¶ 3). He was the sole stockholder of T.M. Music, Inc. ("TM"), a New York corporation which held title to various of his musical copyrights and publishing and recording rights in songs composed by him and others. (App. 162, 163, 165, ¶ 3, 8).

In August 1968, Darin entered into an agreement with the defendant CUC and its wholly-owned subsidiary, CUM, pursuant to which, in return for Darin's transfer to CUM of all his TM stock, CUC became obligated to (i) issue to Darin

at the closing (on September 13, 1968) such number of shares of CUC common stock as would then have had an aggregate market value of approximately $1,300,000 if they had been registered with the SEC and (ii) thereafter use its best efforts to effectuate their registration with the SEC, at CUC's expense, at the earliest practicable time after filing a registration statement in 1968. (App. 163, 164, 39, 58 ¶¶ 4, 5, 6). All Darin's obligations under the agreement were performed and the requisite number of shares of CUC stock issued to him in September, 1968. (App. 164, 169, ¶¶ 6, 21). While a registration statement covering Darin's CUC stock was submitted to the SEC late in 1968, CUC did not use its best efforts to effectuate registration. (App. 165, 166, ¶ 9).

CUC common stock was listed and traded on the American Stock Exchange until July 22, 1969, when CUC requested that trading be suspended. On August 1, 1969 the SEC, at CUC's instance, directed suspension of over-the-counter trading in CUC securities. On or about December 23, 1969, such trading in CUC common stock was resumed. The closing quotation for CUC common stock on the American Stock Exchange on September 13, 1969 was 18; as of August 20, 1970, the date this lawsuit was initiated, the over-the-counter price was approximately $.50 bid, $.75 asked. (App. 164, 165, ¶ 7).

ARGUMENT

I. The Second Amended Unified Complaint Gives Clear Notice of the Claim Asserted and Relief Demanded and Meets all Other Requirements of the Federal Rules of Civil Procedure.

The facts as set forth in the Second Amended Unified Complaint are not in issue on this appeal. That pleading was filed pursuant to the District Court's pre-trial conference order of July 11, 1975, which ordered, inter alia, that certain allegations and an exhibit be stricken from the plaintiff's prior pleading (the Amended Unified Complaint). (App. 157, 158). Yet, despite that evisceration (discussed in Point II of this brief), the resultant pleading gives clear notice of the basis of jurisdiction, the claim asserted and the relief demanded. A complaint need do no more. Rule 8(a), Federal Rules of Civil Procedure. If the defendants were to succeed on their motions to dismiss, it was their burden to "prove to a certainty" that under no state of facts which could be proved in support of his claim could the plaintiff obtain relief. Build of Buffalo, Inc. v. Sedita, 441 F.2d 284 (2d Cir. 1971); Holmes v. New York City Housing Authority, 39 F.2d 262 (2d Cir. 1968). The record in this case and the applicable law reveals the impossibility of any such demonstration and the fundamental error of the District Court.

A. The Complaint States a Valid Claim for Rescission Under New York Law.

The primary relief sought in this action is restoration to Darin's executor of the unique assets which passed from Darin's control into the control of CUC on the closing of Darin's contract with CUC obligating it, among other things, to:

(i) deliver a number of unregistered shares of CUC stock to Darin at the closing (App. 163, ¶ 4), and

(ii) use its best efforts to effect registration of those shares with the SEC at the earliest practicable time after filing a registration statement with the SEC in 1968. (App. 163, ¶ 5).

This contract between Darin and CUC and its subsidiary, CUM, is annexed to the Second Amended Unified Complaint (App. 161). In that pleading Darin's performance of all his obligations under this bilateral contract is alleged, and thus for present purposes admitted. (App. 169, ¶ 21). It is likewise pleaded that CUC failed to take reasonable steps, much less use best efforts, to effect registration of the shares it delivered to Darin under the terms of the contract. (App., 165, 166 ¶ 9). It is further alleged that CUC's obligation to use best efforts to effectuate registration was a material and

essential element of the contract, a contract that would not have been made in its absence. (App. 164, 169 ¶¶ 6, 21). Its breach wrought a total failure of the consideration for which Darin made and performed his promise to turn over his TM stock and relinquish control of its unique assets. (App. 169, 170, ¶ 21).

In the face of these admitted allegations, the District Court's conclusion that the equitable relief demanded is unavailable appears unsupportable.

It has been already established that rescission is an available remedy for a material breach of contract:

> "The right of rescission and an action for restitution, whether in assumpsit or in one of the other legal or equitable remedies generally exist as an alternative remedy to an action for damages where there has been repudiation or a material breach of a contract and . . . are most commonly exercised when the aggrieved party has performed fully or in part, and wishes to recover what he has given or its value. Samuel Williston, A Treatise on the Law of Contracts § 1455 (3d ed. 1970) (emphasis supplied)(footnotes omitted).
>
> "In truth, rescission is imposed in invitum by the law at the option of the injured party, and it should be, and in general is, allowed . . . for any breach of contract of so material and substantial a nature as would constitute a defense to an action brought by the party in default for a refusal to proceed with the contract. Id. at § 1467, citing Phillips & Colby Construction Co. v. Seymour, 91 U.S. 646 [1875]; Farmers Loan and Trust Co. v. Galesburg, 133 U.S. 156 [1890] (footnotes omitted).

See also Restatement of the Law of Contracts §§ 347-357 (1932); Restatement of the Law of Restitution § 108 (1937).

The courts of New York recognize the right of an aggrieved party to rescission and restitution and have ordered the same in cases involving an exchange of securities. In Lauer v. Raymond, 190 App. Div. 319, 180 N.Y.S. 31 (1st Dep't 1920), the plaintiffs alleged that they had purchased stocks of the defendants solely in reliance upon the defendants' assurance that certain persons "obnoxious to the plaintiffs" were not interested in the corporation and would not become interested in it. (It had been initially claimed that the foregoing representation was knowingly false and fraudulent but at trial the plaintiffs waived their rights in fraud and proceeded to recover on their rights in contract.) The Appellate Division held that

> "Rescission is not confined to cases where the injured party has been induced to contract through false and fraudulent representations. A contract may be rescinded by reason of the breach of a condition, as in the case before us." 190 App. Div. at 326.

The court cited with approval 1 Black on Rescission of Contracts § 213:

> ". . . rescission or cancellation may properly be ordered where that which was undertaken to be performed in the future was so essential a part of the bargain that the failure of it must be considered as destroying or vitiating the entire consideration of the

> contract, or so indispensable a part of what the parties intended that the contract would not have been made with that condition omitted." Id.

The rationale of Lauer v. Raymond is equally apposite to the plaintiff's claim in this action.

> "Whatever their reason may have been, the plaintiffs had an absolute right, as a condition for their purchasing the stock in question, to insist that the Lissbergers should not be or become interested in the corporation. . . . They were assured by the defendants that the objectionable parties would not participate therein. The condition being thereafter broken, the plaintiffs were free to rescind the contract. . ." 190 App. Div. at 329.

Darin demanded and received an agreement that CUC use its best efforts to effectuate registration of his unregistered CUC shares at the earliest practicable time. (App. 163, ¶ 5). That agreement was a material and essential element of the exchange; Darin relied on it; and it was breached by CUC. (App. 164, 169, 165, ¶¶ 6, 21, 9). It makes no difference whether CUC's best efforts obligation be deemed a covenant (". . . a breach of one of the covenants that goes to the whole consideration of the contract, gives to the injured party the right to rescind the contract. . ." De Mille Company v. Casey, 121 Misc. 78, 82, (Sup. Ct. N.Y. 1923)), a warranty ("Rescission for breach of warranty may quite generally be had, and the majority of jurisdictions adopted that view as a matter of common law" Williston on Contracts, supra § 1462) or a condition (Lauer v. Raymond, supra). Under New

York, Darin had the right to rescind, if he so elected, and he did so. Accord, Seneca Wire & Manufacturing Co. v. Leach & Co., 247 N.Y. 1, 159 N.E. 700 (1928); Callanan v. Keesville, A.C. & L.C. R.R. Co., 199 N.Y. 268, 92 N.E. 747 (1910); see Marr v. Tumulty, 256 N.Y. 15, 175 N.E. 356 (1931).

In Bloomquist v. Farson, 222 N.Y. 375, 118 N.E. 855 (1918), plaintiffs sought recovery of traction bonds given to the defendants in exchange for irrigation bonds on the grounds that the exchange was effected by false representations made in the prospectus and by the defendants' agent. The complaint alleged fraud, but the trial court found neither fraud nor intent to deceive. The court did find that the prospectus misstated the acreage and the bonded debt per acre of the irrigation district. The defendants asked that the judgments for plaintiffs be reversed on the ground that recovery could not be had in equity by showing merely false representations. In affirming those judgments which ordered rescission of the transaction and restoration of the plaintiffs' consideration, the Court of Appeals stated:

> "An action may be maintained in equity to rescind a transaction which has been consummated through misrepresentation of material facts not amounting to fraud. . . . [I]ntentional misstatements need not be proved. (Hammond v. Pennock, 61 N.Y. 145, 152; Carr v. Nat. Bank & Loan Co. of Watertown, 167 N.Y. 375; Squiers v. Thompson, 73 App. Div. 552; affd., 172 N.Y. 652; Lyon v. James, 97 App. Div. 385, aff'd, 181 N.Y. 512; Schank v. Schuchman, 212 N.Y. 352; Canadian Agency, Ltd. v. Assets R. Co., 165 App. Div. 96 . . .)" 222 N.Y. at 380 (emphasis supplied).

B. CUC's Promise to Use Its Best Efforts to Effect Registration of Darin's Shares Was of the Essence of the Contract.

The District Court erred when it concluded that CUC's promise to use its best efforts to effect registration of Darin's shares was only incidental to the Agreement of August 20, 1968. (App. 198, 199). Having moved under Rule 12(b)(6), the defendants assumed the burden, if they were to prevail, of demonstrating "to a certainty" that as a matter of law under no state of facts that may be proven in support of the allegations of the Second Amended Unified Complaint could the materiality of CUC's best efforts obligation be established. This they could not do, and in light of the record in this case and the applicable law, the order and final judgment below must be reversed.

Under its contract with Darin CUC was obligated to (i) transfer to him a specified amount of CUC stock and (ii) to use its best efforts to effect its registration with the SEC at the earliest practicable time. (App. 163, ¶¶ 4,5). The contract specifically provided that for breach of any of its covenants Darin was entitled to equitable relief, in addition to all other available remedies. (App. 57, 58). Under the plain language of the contract, CUC's promise to use best efforts to effect registration was as material and essential to the bargain as was Darin's representation that

TM owned all the copyrights and other non-fungible assets listed in schedules to the agreement. (App. 30, 31). The nature of the CUC-Darin bargain and the role of best efforts registration obligations in securities transactions make it impossible to understand how the District Court could hold as a matter of law that this obligation was a mere incident of the contract. Marx & Co. Inc. v. Diners' Club, Inc., Civ. No. 70-3064 (S.D.N.Y., Sept. 23, 1975); Republic Technology Fund, Inc. v. Lionel Corporation, 483 F.2d 540 (2d Cir. 1973), cert. denied, 415 U.S. 918 (1974); Maratta v. Associated Sales Analysts, Inc., 19 App. Div. 2d 844 (2d Dep't 1963); see Kupferman v. Consolidated Research & Mfg. Corp., CCH Fed. Sec. L. Rep. ¶ 91,197 (S.D.N.Y. 1962); Benjamin v. Vernitron Corp., CCH Fed. Sec. L. Rep. ¶ 93,002 (Sup. Ct. N.Y. 1970)

The case of Seneca Wire & Mfg. Co. v. Leach & Co., 247 N.Y. 1, 159 N.E. 700 (1928) decided by the New York Court of Appeals is apposite. Plaintiffs informed the defendant that it was considering the purchase only of listed securities and the defendant then recommended a particular investment, "calling attention to the fact that application would be made to list the securities." 247 N.Y. at 4. Subsequently, the defendant informed the plaintiffs that application had already been made and the securities would be listed. One of the plaintiffs testified that he relied

on these representations, and made the investment recommended. A few months later the company involved went into receivership and plaintiffs then learned that no listing application had been made, that defendants never intended to make such application, and that the defendants' statements on that score were false. The plaintiffs rescinded the sale, offered to return the securities and demanded the return of the purchase price. At the end of the plaintiffs' case the complaint was dismissed.

The Court of Appeals reversed and held that the pla ntiffs had made out a cause of action entitling them to relief. Pointing out that the plaintiffs had not proved or attempted to prove that the misrepresentations were willfully false or fraudulently made, the Court said:

> "It is not necessary in order that a contract may be rescinded for fraud or misrepresentation that the party making the misrepresentation should have kn that it was false. Innocent mi resentation is sufficient, and thi ule applies to actions at law based upon rescission as well as to actions for rescission in equity. 247 N.Y. at 7-8.

The Court also addressed the question of materiality:

> "Were the representations material? In the first place, the parties themselves made the representations material because [plaintiffs] told [defendants] that they only desired to purchase listed securities or those which were to be listed. And in the next place, Michael J. Murphy, vice-president of the Federation Bank of New York, testified that it would

> be a favorable factor from the standpoint of a purchaser to know that securities were listed or would be listed on the New York Stock Exchange; that there is value in the statement that application is to be made for listing, as it is a factor in purchasing. William D. Williams, assistant secretary of the New York Stock Exchange, described the care with which securities and corporations were investigated when application was made to list them. And [plaintiff] swore: 'I banked on that the company would not make application to list unless they were of a quality that would pass the requirements, and I took it for granted that they knew what the requirements were. I accepted the statement that an application to list meant listing.'" 247 N.Y. at 6-7.

The Court of Appeals concluded, "there was, therefore, sufficient evidence regarding these representations to make their materiality a question for the jury." 247 N.Y. at 7.

The considerations underlying reversal in Seneca require reversal in Darin's action. In view of the allegations in the complaint regarding materiality and reliance, Darin made CUC's representation as essential as Seneca's. (App. 164, 169, ¶¶ 6, 21) The fact that Darin extracted a "best efforts" covenant rather than a covenant to register in no way mitigates the former's materiality. In light of Seneca, plaintiff must be given his day in court on the question of materiality.

C. Equitable Rescission Will Restore the Parties to the Contract as Nearly as Possible to their Former Positions.

Upon rescission, equity will to the extent possible operate to restore the parties to the contract to their positions status quo ante. Restatement of the Law of Contracts § 347, comment b (1932). Equity's mandate is frustrated only in the most extreme cases, such as when the property sought to be recovered has come into the possession of a bona fide purchaser without notice, has been physically incorporated into another structure so as to prevent removal, or has passed through so many hands and has been so altered that it becomes impossible for a court to put all the pieces together again. See, e.g., Restatement of the Law of Contracts § 354, comment b; Fink v. Friedman, 78 Misc. 2d 429, 358 N.Y.S.2d 250 (Sup. Ct. 1974) None of the foregoing exceptions is present in this case.

The defendants have argued and the District Court has concluded that the transfer of the TM assets to the Hudson Bay defendants, the subsequent change in relative value of the CUC stock and the TM assets, and the equities of third parties bar rescission. These conclusions, involving essentially matters of affirmative defense not properly considered on a Rule 12(b)(6) motion, evaporate under scrutiny.

(i) The change in the relative values and status of the stock and of the assets does not bar rescission.

The District Court concluded that the equitable relief demanded by plaintiff cannot be granted "in that the

Second Amended Unified Complaint reveals that events since [the] exchange of stock ... have radically changed the relative values and status of the shares exchanged ... and of the assets" once held by TM and, accordingly, that the status quo ante cannot be restored. (App. 199).

The conclusion that rescission as against CUC and CUM cannot be awarded because of a decline in the value of the CUC stock given to Darin in 1968 simply does not wash. In Black, Rescission of Contracts § 618 (2d ed. 1929), it is stated:

> "[I]f the restoration of the former status is prevented by the opposite party, or if it has become impossible because of such party's fault, fraud, or wrongful conduct, such impossibility of restitution is no obstacle to the rescission of the contract."

See also Restatement of the Law of Restitution § 65(d) (1937); Williston on Contracts § 1463 (1970).

The problems, financial and legal, that plagued CUC are a matter of public record. There is nothing in the record to indicate that they were not within the power of CUC to control, and thus, they can offer no excuse for CUC's failure to perform its best efforts obligation. As Judge Ward instructed the jury in Marx & Co., Inc. v. Diners' Club, supra, an action concerned with a virtually identical best efforts obligation:

> "Under the law, Diners' 'best efforts' obligation required Diners' to do everything that would reasonably have to be done to cause the registration statement to become

> effective so that in the normal course of events, Diners' best efforts would result in the registration statement becoming effective. Diners' best efforts obligation was not limited by circumstances or factors within its control, but rather was limited only by external causes over which Diners' would have no control." (Transcript 1959).

The status of the nonfungible assets formerly controlled by Darin has changed in no significant way. As the complaint alleges, those assets were transferred by CUC and CUM to the Hudson Bay defendants with notice of and indemnity against Darin's lawsuit and claims. (App. 168, 169, ¶¶ 17,18). There has been no showing of any obstacle to plaintiff's claim for restitution beyond a totally unsubstantial suggestion that intervening interests make restitution impossible. If these assets are irretrievably encumbered, the defendants can plead accordingly in answer to the complaint. They cannot, however, prevail on a motion addressed to the sufficiency of the complaint on the basis of speculation as to an unpleaded affirmative defense.

Even assuming a radical change in the property exchanged, that fact could have no bearing here. In similar actions for rescission and restitution, courts have effectively balanced the equities among the parties to far more complex transactions and transfers. In Marr v. Tumulty, 256 N.Y. 15, 23-25 (1931), an action for rescission of a corporate stock transaction and restitution, the defendants' argued that intervening sales and interests of "innocent

persons, strangers to the defendants' wrong" barred rescission. The court acknowledged that the "mazes of ... interlocking directorates are not easily unraveled" and that the transfers to third parties were "complicated and not easily understood," but found that the intervening transfers did "not offer an obstacle to the plaintiff in his claim for restitution." It was error for the District Court to conclude otherwise on the only apparent basis of conclusory and specious protestations in the defendants' briefs.

Plaintiff's pleading suggests no complexity comparable to what existed in Marr v. Tumulty. If the defendants are aware of facts not before the court, then they should be pleaded and put to the test of proof on trial as in any other lawsuit.

(ii) The complaint states a claim entitling the plaintiff to the relief demanded against the Hudson Bay defendants.

The District Court concluded that even if plaintiff were entitled to relief as demanded against CUC and CUM, the Second Amended Unified Complaint is "fatally deficient" as to the Hudson Bay defendants "in that it fails to show any facts entitling plaintiff to the equitable relief demanded against [those] defendants." (App. 200). This conclusion ignores the plain language of the complaint and is erroneous.

It is alleged that after this action was commenced CUC transferred to the Hudson Bay defendants and others all assets owned by TM as of the time its entire capital stock was acquired from Darin in 1968 and all rights which had accrued thereon. (App. 168, ¶ 17.) The complaint also alleges that at the time of such transfer, the Hudson Bay defendants (i) knew of the pendency of this action and of Darin's demand for rescission and restoration of the TM assets, and (ii) obtained from CUC and others in connection with the foregoing transfer, indemnification against obligations or liabilities to Darin, including an award of the TM assets. (App. 168, 169, ¶ 18). As such of those assets as came into the control of the Hudson Bay defendants were received by those defendants with notice, and after extracting full indemnities, it is impossible to conceive how the equities of those defendants could be superior to plaintiff's. But any such determination is for another day. The issue here is the legal sufficiency of a complaint in which plaintiff has pleaded facts entitling him to equitable relief against those defendants.

The Hudson Bay defendants argued below that they were innocent purchasers for value without notice and therefore beyond the reach of equity and rescission. In support, they have cited authorities primarily concerning negotiable instruments and fraudulent transfers which are clearly

inapposite. The controlling authorities, which they purport to rely on, are clearly against them.

> "... a transferee of property is not a bona fide purchaser if at any time prior to the transfer he has notice of the facts giving rise to a constructive trust of the property...." Restatement of the Law of Restitution § 175(1) (1937)
>
> "Except in the case of the holder of a negotiable instrument, a person has notice of facts giving rise to a constructive trust if he knows the facts or should know them." Id. § 174 (emphasis supplied).
>
> "... where a person acquires property by fraud or otherwise under such circumstances that he holds it upon a constructive trust for the transferor, and the transferee transfers the property to a person who is not a bona fide purchaser, the latter holds the property upon a constructive trust for the person equitably entitled to it. Id. § 168.
>
> "In some cases a person is chargeable with notice of the facts ... even if he does not know them... So also, a person purchasing property may be chargeable with notice of a decree, or that a suit is pending."* Id. § 174, comment b.

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* Note should be made of New York's common law lis pendens doctrine, in the context of actions involving personalty. See 7A Weinstein, Korn & Miller, New York Civil Practice ¶ 6501.03 (1969). Under this doctrine, a person who takes personal property which is the subject of pending litigation without actual notice of the litigation and for full consideration may be bound to the judgment in the pending suit. See Leitch v. Wells, 48 N.Y. 585 (1872). It appears that a federal court sitting in diversity will apply the lis pendens law of the forum state. 2 Moore, Federal Practice ¶ 3.05 (1974). While application of this Draconian rule to a purchaser without actual notice is not sought on this appeal, its applicability to the Hudson Bay defendants, purchasers with full knowledge of the pending litigation, appears fully reasonable and in accord with the law of New York.

Were there room for doubt on the matter, the New York Court of Appeals, however, has succinctly resolved any question as to the error committed by the District Court in interposing a bar to rescission because of the transfer to the Hudson Bay defendants:

> "Rescission is not checked until the property to be reclaimed has passed into the ownership of a purchaser for value without notice of the wrong." Marr v. Tumulty, 256 N.Y. 15, 23 (1931).

(iii) Plaintiff is entitled to restoration of the assets owned by TM at the time of the closing of the contract.

The District Court concluded, without cited precedent or any applicable authority advanced by the defendants, that the equitable relief demanded cannot be granted in that the Second Amended Unified Complaint seeks a return of the TM assets and that "no facts are alleged therein showing any entitlement of plaintiff to such corporate assets even if rescission ... were ordered." (App. 199). The court's conclusion, apparently inspired by the defendants' attempt to shroud the equities in a corporate veil, is untenable in light of the pleaded facts and New York law.

In exchange for a specified amount of unregistered CUC stock and an undertaking with respect to its registration, Darin transferred all the stock of TM, and with it title to all of TM's assets as well as the benefit of an exclusive songwriter's contract. For what has proved a mess

of pottage Darin relinquished control of valuable copyrights and other rights in unique musical compositions. TM was valued by its assets and those assets cannot be ignored by a court in equity on the basis of bare speculations contained in the defendants' briefs. Restitution should fairly extend to those assets unless on trial, or by proper prior proof in summary judgment, it is demonstrated that supervening equities would render such a result improper. Such a demonstration has not been made, and indeed, cannot be made.

Darin gave notice of his election to rescind the agreement in April of 1970. This action was commenced in August of 1970. CUC and CUM had full knowledge of Darin's claims herein and demand for rescission and restitution when they transferred the assets of TM to third parties in November 1970. In a display of reductio ad absurdum, their counsel suggested below that Darin is entitled to nothing more than the denuded stock of TM. Even more remarkable, the District Court has apparently adopted this circular ratiocination as a conclusion in bar of the plaintiff's claim for rescission. Neither the defendants nor the District Court has cited a single authority for this contorted conclusion.

The District Court seems to have forgotten the mandate of a court of equity -- a court recognized for its practice of discouraging "circuitous or unnecessary litigation" and "in securing to parties full relief when in its

portals." De Mille v. Casey, 121 Misc. 78, 80, 201 N.Y.S. 20, ___ (Sup. Ct. N.Y. 1923). Plaintiff seeks rescission of the vitiated bargain and to recover the unique assets which Darin transferred or their value. This relief is surely within the competence of the District Court, and it was error for it to conclude otherwise.

D. Rescission is Not Barred By Failure to Plead Damages.

The District Court concluded that the Second Amended Unified Complaint is "fatally deficient" in that it lacks allegations to show that CUC's failure to honor its best efforts obligation "was the cause of any injury" to Darin. (App. 199, 200). This erroneous conclusion ignores the pleading requirements for a claim of equitable rescission and the clear language of the complaint.

The court below has, in essence, required that the plaintiff plead damages in order to state a claim in equity. This is, of course, contrary to the law. It is pleaded and for present purposes admitted that CUC's breach deprived Darin of a valuable benefit for which he had bargained, i.e. action to take best efforts to effect registration of his shares without expense to him. (App. 169, ¶ 21). Certainly, the Federal Rules of Civil Procedure do not require that in a contract rescission action under New York law in the United States District Court for the Southern District of New York the plaintiff must plead that deprivation of the benefit

of performance of such an obligation caused damage in a fixed dollar amount. Governing authority is unequivocably to the contrary.

In Lauer v. Raymond, 190 App. Div. 319, 180 N.Y.S. 31 (1st Dep't 1920) it was urged that plaintiffs were not entitled to rescission of an agreement to purchase stock because there was no proof that the value of the stock was affected by the defendant's breach of a condition that certain persons obnoxious to plaintiff were not, and would not become, interested in the corporation. The court summarily dismissed that contention:

> "That matter, it seems to me is quite aside from the issue. Whatever their reason may have been, the plaintiffs had an absolute right . . . to insist that the Lissbergers should not be or become interested in the corporation . . . . [Plaintiffs] were assured by the defendants that the objectionable parties would not participate therein. The condition being thereafter broken, the plaintiffs were free to rescind the contract . . . " 190 App. Div. at 329.

The rationale of the Lauer case is equally applicable to plaintiff's claim herein. It is pleaded that in reliance upon CUC's promise to perform its best efforts to effect registration of his stock Darin entered into the agreement; CUC's promise was a material and essential element of the agreement; that promise was broken. Every necessary element of a claim for equitable rescission has been pleaded. See, e.g. , Berger v. McHugh, 26 F. Supp. 107, 110 (M.D. Pa. 1939).

In the unlikely event that this Court should conclude that Rule 8 of the Federal Rules of Civil Procedure

requires more specific pleading of injury in an action for rescission for breach of a covenant to use best efforts to effect registration of stock with the SEC, plaintiff respectfully requests leave so to plead.

E. Plaintiff is Entitled to Rescission of the Contract Without Pleading an Independent Breach by CUM.

CUC and CUM argued and the District Court erroneously concluded, that the relief demanded by plaintiff may not be granted in that the Second Amended Unified Complaint shows no breach by defendant CUM. This notion may be disposed of summarily.

The pleading in issue does not ignore CUM's corporate existence. Indeed, it alleges that Darin entered into an agreement with CUC and CUM, and upon its closing transferred to CUM all of the stock of TM.

Under paragraph 14 of the agreement, the best efforts obligation is CUC's. (App. 58). Under paragraph 4 of the agreement the best efforts obligation appears to be made jointly by CUC and CUM. (App. 39). In any event, and whatever the respective rights and liabilities of CUC and CUM inter sese, the agreement specifically provides that, in addition to all other relief which may be available to Darin, he shall be entitled to equitable relief if either CUC or CUM fails to comply with any of the covenants or agreements made by either party.

Finally, the defendants' assertion, and the District Court's apparent conclusion (App. 199), if such it is, that there are no allegations and could be no proven state of facts permitting the corporate existence of CUM to be ignored, is diametrically opposed to the position of CUM as stated in its Interrogatory Answers dated September 6, 1974.*

* * *

The Second Amended Unified Complaint stated a claim for equitable relief against all of the parties defendant and it was the obligation of the District Court to balance the equities among the parties:

> "Equity will not permit a wrong to remain unrighted if there is any possible way to remedy the situation." Ilyin v. Avon Publications, 144 F. Supp. 368, 374 (S.D.N.Y. 1956) (emphasis supplied).

II. Plaintiff Has Been Seriously Prejudiced By the District Court's Order Striking Portions of the Amended Unified Complaint.

A. Introduction.

The Amended Unified Complaint, which was filed on August 5, 1974, eliminated substantial matter pleaded in the 1970 complaint. This revision, shaped by a desire to meet the District Court's proper concerns as to narrowing of

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* "If CUM had a duty to use any effort to cause the Registration Statement to become effective, that effort was made for it by [CUC] as CUM's parent and issuer of the securities covered by the Registration Statement . . . ."

issues and specificity of pleading, eliminated numerous defendants and causes of action and in its single cause of action pleaded a claim for equitable relief, principally rescission.

Before the defendants moved for the final order and judgment from which plaintiff has appealed, the District Court struck four allegations and an exhibit from the Amended Unified Complaint, on the grounds that such material was "impertinent and immaterial" within the meaning of Rule 12(f) of the Federal Rules of Civil Procedure. (App. 155). In plaintiff's view, this order constituted prejudicial error, not appealable as of right at the time of entry, and accordingly this issue is raised now. 28 U.S.C. § 1292 (a); 9 J. Moore, Federal Practice ¶ 110.17 (1970).

The material so stricken from the Amended Unified Complaint alleged (i) deficiencies in CUC's efforts to effect registration of the shares of its stock issued to Darin pursuant to the contract and (ii) the position of the SEC regarding identical and similar deficiencies in contemporary filings with the SEC by CUC. (App. 76-78). By striking this material the court below not only prevented the plaintiff from pleading any reference to the position of the SEC in litigation as to deficiencies in 1969 proxy and registration filings with the SEC relating to CUC and its securities but also precluded plaintiff from repleading without reference to the SEC's position the allegations

of its prior pleading as to deficiencies in CUC's proxy statement and registration filings with the SEC covering Darin's unregistered shares.* (App. 166, 167). On both counts the Court committed prejudicial error.

B. Striking the Allegations as to the Position of the SEC Was Unwarranted.

Plaintiff has not pleaded a violation of the federal securities laws. This is an action for equitable relief based on CUC's failure to honor its promise, performance of which was an essential element of the agreement in issue.**

As certainly need not be demonstrated to this Court nor at the pleading stage below, registration of securities with the SEC is a principal element in the scheme of federal securities regulation. The only way to effect registration is to file with the SEC documents in prescribed form regarding the company which satisfy applicable SEC disclosure requirements. In this process, the SEC's function "is to assure that the registration statement is accurate and complete." I L. Loss, Securities Regulation, 130 (2d ed. 1961). Unless registration with the

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* Plaintiff's expressly requested that the Court's order on the motion to strike permit pleading of these deficiencies without reference to the position of the SEC or the action instituted by the SEC. (App. 175-195)

** For the terms of CUC's promise, the Court is respectfully referred to paragraphs 4 and 14 of the agreement between the parties, a copy of which is annexed to each pleading herein by the plaintiff or Darin. (App. 38, 58).

SEC had become effective, securities such as those Darin received from CUC could not be publicly sold without the risk of incurring severe penalties. Accordingly, it was an essential part of Darin's bargain that CUC use its best efforts to effect registration of his securities with the SEC at the earliest practicable time.

Darin's claim in this litigation is that CUC did not employ its best efforts to effect registration of the stock he acquired from CUC. (App. 165, ¶ 9). Plaintiff therefore included allegations as to the SEC's position with respect to CUC's disclosures of its history and operations, including the fact that, when confronted with concurrent CUC filings containing identical allegations with respect to CUC and its business and operations as set forth in the registration statement covering Darin's shares, the SEC commenced an action against CUC for violation of the statutes in accordance with which CUC had implicitly undertaken to use its best efforts to effectuate registration. (App. 76-78).

The pertinence and materiality of the allegations regarding the SEC action to CUC's performance of its promise to Darin are plain. At the very time that CUC was obligated to use its best efforts to effect registration of Darin's shares of CUC stock it was in fact filing material with the SEC that rendered the required Darin registration difficult or impossible. Indeed, the agency whose action was

required to effect registration was so moved by the treatment in CUC filings of matters treated identically in the registration statement covering Darin's shares that it sought to enjoin CUC for fraud.

The rule with respect to Rule 12(f) motions is clear, "Matter will not be stricken from a pleading unless it is clear that it can have no possible bearing upon the subject matter of the litigation." 2A J. Moore, Federal Practice ¶ 12.21[2] (2d ed. 1974) (emphasis supplied). Neither the defendants nor the District Court cite authority which in any way derogates from this rule. The defendants, and perhaps the District Court, relied principally on a series of antitrust cases construing Section 5(d) of the Clayton Act (15 U.S.C.A. § 16(a)) and on two prior orders in this docket, but not in this action, involving claims for relief under the federal securities laws. Their reliance is misplaced. This is not an antitrust action, and plaintiff has not pleaded the SEC action as proof of the accuracy of the SEC's allegations -- the consent decree has not been pleaded.* The District Court's prior orders striking from the Unified Seeburg Complaint and the Amended Complaint in the Fried and Teitelbaum actions ** references to the SEC

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* In one of the authorities relied on by defendants, Atlantic City Electric Co. v. General Electric Co., 207 F.Supp. 620 (S.D.N.Y.) aff'd, 312 F.2d 236 (2d Cir. 1962), the court ordered references to pleas of nolo and judgments entered thereon stricken, but held that in their place the complaint would be regarded as containing statements of when the criminal action was begun and when terminated.

** Seeburg-Commonwealth Multidistrict Litigation, Docket No. M 19-95, 69 Civ. 5736.

action and CUC's consent to entry of a consent judgment against it are not controlling here. Both of those actions arose under the federal securities laws; in both a trial by jury was demanded. The potential for prejudice was thus obvious.* Moreover, the prejudicial impact was heightened by the apparent misrepresentation of the SEC's allegations contained in the Unified Seeburg Complaint; by the fact that the Commission's allegations were directed at transactions occurring after the expiration of the Seeburg tender offer (the subject matter of those actions); by the fact that the consent decree could have no legal estoppel effect and by the fact that the SEC action had no logical nexus with the issues before the court in Fried and Teitelbaum. Finally, those two prior orders have no bearing on Darin's action and the subject matter of the complaint.

Plaintiff has argued before, and it bears repeating, that performance of a best efforts covenant cannot be determined in vacuo. See Perma Research & Development Co. v. Singer Co., 308 F. Supp. 743, 748 (S.D.N.Y. 1970). One of the elements to be considered was the position of the SEC with respect to concurrent filings containing identical matter as was set forth in the registration statement

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* The defendants' passing claim that the pleading of the SEC action is scandalous and prejudicial is baseless. This case will not be tried to a jury but to a court familiar with CUC's history and the allegations of the SEC action. See Daggs v. Periodical Publisher's Service Bureau, Inc., 36 F.R.D. 48 (D. Conn. 1964).

covering Darin's shares of CUC stock. It was plainly error to preclude plaintiff from pleading that position.

(C) The District Court Was in Error to Prevent the Plaintiff from Repleading the Substance of the Stricken Allegations But Without Reference to the Concurrence of the SEC.

The District Court granted, in all respects, the defendants' motions to strike and then in settling the order, over the further objections of the plaintiff, proceeded to preclude plaintiff's repleading of the earlier pleaded deficiencies in CUC's SEC filings without reference to the fact that the SEC concurred in those views. The District Court's prohibition reached not only a CUC proxy statement and registration statement dealing with a transaction unrelated to Darin's agreement and shares, but also, in part, the registration statement, as twice amended, covering Darin's stock. Thus, as a comparison of the two pleadings will confirm, some of the allegations, designed to show deficiencies in CUC's filings and lack of best efforts, have now been converted in the Second Amended Unified Complaint into innocuous statements of historical fact. (App. 76-78 and 166-167).

As already noted the purpose of a Rule 12(f) order is to prune impertinent and immaterial allegations from a pleading. 2A J. Moore, Federal Practice ¶ 12.21 (2d ed. 1974). The Rule does not authorize evisceration of material allegations

and claims from a complaint. Even assuming, and we make no concession on this score, that the District Court correctly ordered allegations about the SEC action stricken, there is no conceivable basis under the Rule for precluding allegations as to the plain deficiencies of CUC's efforts to register Darin's stock with the SEC. Id. The District Court's order of July 11, 1975 was erroneous, was in contravention of the spirit and plain meaning of the Federal Rules of Civil Procedure and should be reversed.

* * *

CONCLUSION

The District Court's order and judgment dismissing the Second Amended Unified Complaint and striking certain material from the Amended Unified Complaint have no warrant in the record or in the law. The judgment should be reversed and the action remanded with directions to reinstate the Amended Unified complaint. It is further requested, in view of the vintage of the action and the approaching end of the Seeburg-Commonwealth docket, that it be assigned to a judge regularly sitting in the Southern District of New York.

Respectfully submitted,

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Dated: May 26, 1976

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Burns, Van Kirk, Greene & Kafer

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LORD, DAY & LORD

ATTORNEYS FOR HUDSON BAY MUSIC CO.